

Supreme Court, U. S.

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No. 76-1840

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In the Supreme Court of the United States

MICHAEL RODAK, JR., CLERK

OCTOBER TERM, 1977

SAM POLUR, PETITIONER

v.

HONORABLE ROSZEL C. THOMSEN AND UNITED STATES  
COURT OF APPEALS FOR THE FOURTH CIRCUIT

*ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE  
FOURTH CIRCUIT OR FOR A WRIT OF MANDAMUS*

MEMORANDUM FOR THE RESPONDENTS  
IN OPPOSITION

WADE H. McCREE, JR.,  
*Solicitor General,*  
*Department of Justice,*  
*Washington, D.C. 20530.*

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On October 10, 1973, in the United States District Court for the District of Maryland, former Vice President Spiro T. Agnew entered a plea of *nolo contendere* to a charge of federal income tax evasion, in violation of 26 U.S.C. 7201. The court suspended the imposition of sentence, placed Agnew on three years' unsupervised probation, and fined him \$10,000 (Pet. App. A-4).

Approximately three years later, petitioner instituted a civil action in the United States District Court for the District of Maryland, seeking substantial monetary damages from Agnew and Education for Democracy, Inc. (a corporation allegedly controlled by Agnew; see Pet. App. B-90), on the basis of alleged violations of several

federal statutes. On October 5, 1976, ostensibly in connection with his pending civil action, petitioner filed a proposed "Order to Show Cause why Spiro T. Agnew should not have his probation revoked" (*id.* at B-59 to B-72). This motion essentially relied upon the allegations contained in petitioner's complaint in the civil action (*id.* at A-5). On October 8, 1976, Judge Thomsen, to whom the civil action had been assigned, conducted a hearing on petitioner's charge that Agnew had violated the terms of his probation by engaging in criminal conduct. Judge Thomsen noted that the allegations, if proven, might justify probation revocation pursuant to 18 U.S.C. 3653, and he accordingly requested the Department of Justice to investigate petitioner's contentions and to recommend whether any action should be taken (*id.* at A-5 to A-7).<sup>1</sup>

By letter to Judge Thomsen dated February 16, 1977, Assistant Attorney General Richard L. Thornburgh recommended that Agnew's probation not be revoked (Pet. App. B-83 to B-86). The letter focused upon the only two claims of misconduct alleged by petitioner to have occurred during the probationary period: (1) that Agnew had failed to register as a foreign agent in connection with his work for Education for Democracy, Inc., and (2) that Agnew failed to report or deliver to the State Department until April 1, 1974, a number of gifts that he had received from officials of foreign governments while he was Vice President. As to the former charge, the Department of Justice concluded that there was no reason to believe that Agnew, through Education for Democracy, Inc., had acted on behalf of or in the interest of any foreign principal or had otherwise incurred liability by failing to register as an agent, in violation of the Foreign Agents Registration Act, 52 Stat.

631, as amended, 22 U.S.C. 611 *et seq.* With respect to the latter charge, the Department determined that although there apparently had been technical violations of the Foreign Gifts and Decorations Act, 5 U.S.C. 7342, as a result of Agnew's delay in delivering certain gifts he received in 1971, "in view of the administrative rather than criminal background of the Act, it would be inappropriate to use the quasi-criminal sanction of probation revocation in this case" (Pet. App. B-86).

Upon receipt of the Department of Justice's report, Judge Thomsen scheduled a hearing for March 14, 1977, to determine whether a probation revocation hearing should be held (Pet. App. A-12 to A-14). On March 11, 1977, three days before the hearing date, petitioner filed petitions in the court of appeals for a writ of mandamus and for a temporary stay of the district court proceedings (*id.* at B-88 to B-106). The senior judge on the panel of the court of appeals to which the petitions were referred advised Judge Thomsen to proceed with the scheduled hearing but to defer decision until the appellate court had acted upon petitioner's requests (*id.* at A-10).

At the hearing on March 14, 1977, Deputy United States Attorney Paul Kramer formally recommended that no action be taken to revoke Agnew's probation (Pet. App. B-116), a recommendation that was concurred in by the Probation Office (*id.* at B-120 to B-122). After hearing from petitioner and from Agnew's attorney, Judge Thomsen adjourned the proceedings and reserved decision pending disposition by the court of appeals of the petitions for a writ of mandamus and a temporary stay (*id.* at B-141).

On March 16, 1977, the court of appeals denied petitioner's requests to prevent the district court from acting

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<sup>1</sup>Petitioner's appeal from this order was dismissed by the court of appeals on April 4, 1977 (No. 76-2381).

on the probation revocation matter (Pet. App. A-2 to A-3).<sup>2</sup> Thereafter, on March 22, 1977, Judge Thomsen decided to follow the recommendations of the Department of Justice and the Probation Office and not to initiate probation revocation proceedings against Agnew (*id.* at A-4 to A-11; 428 F. Supp. 1293). Petitioner appealed this ruling on March 31, 1977, but his appeal was dismissed by the court of appeals on July 21, 1977, for want of prosecution (App., *infra*).

1. Petitioner contends that the court of appeals erred in denying his petition for a writ of mandamus to prevent Judge Thomsen from holding the proceedings scheduled for March 14, 1977. Since these proceedings have already occurred and the district court has finally determined not to hold an evidentiary hearing on whether Agnew's probation should be revoked, petitioner's request for relief is moot. See *Brockington v. Rhodes*, 396 U.S. 41, 43; *Owens v. Brierley*, 462 F. 2d 125, 126 (C.A. 3); *In re Grand Jury, August, 1965*, 360 F. 2d 917, 918 (C.A. 7); *Richland v. Crandall*, 353 F. 2d 183, 184 (C.A. 2).

2. In any event, petitioner lacks standing to challenge Judge Thomsen's decision not to initiate probation revocation proceedings against Agnew. The concept of standing arises from "the constitutional limitation of federal court jurisdiction to actual cases or controversies," *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 37, and "focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated." *Id.* at 38, quoting from *Flast v. Cohen*, 392

U.S. 83, 99. See *Warth v. Seldin*, 422 U.S. 490, 498-499; *United States v. Richardson*, 418 U.S. 166, 176-180; *Linda R. S. v. Richard D.*, 410 U.S. 614, 617-618. Where, as here, "a plaintiff's standing is brought into issue the relevant inquiry is whether, assuming justiciability of the claim, the plaintiff has shown an injury to himself that is likely to be redressed by a favorable decision. Absent such a showing, exercise of its power by a federal court would be gratuitous and thus inconsistent with the Art. III limitation." *Simon v. Eastern Ky. Welfare Rights Org.*, *supra*, 426 U.S. at 38. Petitioner's personal stake in the determination whether to revoke Agnew's probation—a stake indistinguishable from that of any other citizen—is plainly insufficient to entitle him to challenge the propriety of the proceedings below.

The granting of probation, as well as its revocation, are matters addressed to the discretion of the district court. 18 U.S.C. 3651, 3653. See, e.g., *United States v. Brown*, 488 F. 2d 94 (C.A. 5); *United States v. Lara*, 472 F. 2d 128, 129-130 (C.A. 9); *United States v. Alarik*, 439 F. 2d 1349, 1351 (C.A. 8). Hence, Judge Thomsen's decision was similar in many respects to a prosecutor's absolute authority not to bring criminal charges. See *United States v. Nixon*, 418 U.S. 683, 693. In neither case does a private citizen have standing to invoke the power of the criminal justice system against another individual. Petitioner's responsibilities were fulfilled, and his role ended, when he called the attention of the district court to certain facts that might have supported a revocation of Agnew's probation. See *Bass Anglers Sportsman Society v. United States Steel Corp.*, 324 F. Supp. 412, 415 (D. Ala.), affirmed *sub nom. Bass Anglers Sportsman Society v. Koppers Company*, 447 F. 2d 1304 (C.A. 5). As this Court stated in *Linda R. S. v. Richard D.*, *supra*, 410 U.S. at 619:

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<sup>2</sup>The court of appeals denied a petition for rehearing on April 21, 1977 (Pet. App. A-1). Petitioner's assertion (Pet. 30, 33) that Judge Thomsen lacked power to rule on the probation revocation question before the time to petition for rehearing in the court of appeals had expired is incorrect. The court of appeals ordered on March 16, 1977, that its mandate issue forthwith (Pet. App. A-3).

The Court's prior decisions consistently hold that a citizen lacks standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution. See *Younger v. Harris*, 401 U.S. 37, 42 (1971); *Bailey v. Patterson*, 369 U.S. 31, 33 (1962); *Poe v. Ullmann*, 367 U.S. 497, 501 (1961). Although these cases arose in a somewhat different context, they demonstrate that, in American jurisprudence at least, a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another.

It is therefore respectfully submitted that the petition for a writ of certiorari or for a writ of mandamus should be denied.

WADE H. MCCREE, JR.,  
*Solicitor General.*

AUGUST 1977.

## APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 77-1664

In the case of:  
USA vs. Spiro T. Agnew

Sam Polur,  
Appellant,  
versus

United States of America  
and Spiro T. Agnew,  
Appellees.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Roszel C. Thomsen, District Judge.

IT IS ORDERED that the above appeal is dismissed for want of prosecution pursuant to Local Rule 10.

IT IS FURTHER ORDERED that a certified copy of this order be issued to the Clerk of the District Court as and for the mandate.

/s/ WILLIAM K. SLATE, II

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CLERK

Filed July 21, 1977